IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 26 of 2006.

Reserved on: 28.3.2007.

Date of decision: 25.4.2007

Parkash Chand ... Appellant

Versus

State of H.P … Respondent

Coram :

The Hon'ble Mr. Justice V.K. Ahuja, Judge.

Whether approved for reporting?[1] No.

For the appellant: Mr. Anup Chitkara with Mr. Bhupender Ahuja, Advocates.

For the respondent: Mr. Ashutosh Burathoki, Additional Advocate General.

Mr. Alok Ranjan, Advocate, for the complainant.

V.K. Ahuja, J.:

This appeal has been filed by the appellant against the judgment of the Court of learned Presiding Officer, Fast Track Court, Hamirpur, dated 31.12.2005, vide which the appellant was held guilty under Section 307 I.P.C. and convicted and sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.10,000/-. In default of payment of fine, the appellant was to undergo simple imprisonment for a period of 1½ years.

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[1]Whether reporters of Local Papers may be allowed to see the judgment? Yes.

Briefly stated the facts of the case are that on 30.12.2002 a statement under Section 154 Cr.P.C. was made before the police by Smt. Kamlesh Kumari wife of Bidhi Chand that her husband is serving in Merchant Navy and had come on leave. Today at about 9.30A.M. her husband had gone along with the labourers for cutting of Tuhni tree and Parkash Chand, appellant, (hereinafter referred to as accused) who is the elder brother of her husband came there along with Darat and gave abuses. He asked her husband to leave the place, failing which, he will kill him and will not allow him to cut the Tuhni tree. Her husband told the accused that this Tuhni tree belongs to him and he will get it cut since he is in need of it. Thereafter, Parkash Chand attacked her husband with Darat and gave a blow of Darat on his head and blood started oozing out. She along with Dev Bahadur and other persons present there rescued her husband. It was further alleged that Parkash Chand was having dispute with her husband in regard to the land and had earlier also threatened to take his life. On this report, a case was registered by the police and on investigation, the challan under Section 307/506 I.P.C. was filed against the appellant. The challan was committed to the Court of learned Sessions Judge and it was assigned to the learned trial Court who tried the appellant under Section 307/506 I.P.C. The appellant was held guilty under Section 307 I.P.C. only and was convicted and sentenced as detailed above.

I have heard Mr. Anup Chitkara, Advocate, for the appellant, Mr. Ashutosh Burathoki, learned Additional Advocate General for the respondent and Mr. Alok Ranjan, Advocate, for the complainant and have also gone through the record.

The submissions made by the learned counsel for the appellant were that the complainant party had come to the spot along with 6 Charanies sand since they were armed with the weapon used for cutting of the tree, no injury was inflicted by the appellant. It was also submitted that the complainant gave danda blows to the accused and in the process of rescuing himself, a scuffle took place and the complainant fell down on the ground and received the injuries. It was also submitted that the land where the Tuhni tree existed belongs to the appellant and since tree was being forcibly cut, in the alternative he had only given one blow in defence and there was no direct attack. It was also submitted that the appellant had got the possession of the land where the tree stands in family settlement and the right of defence in the alternative was available to the appellant who exercised this right. The presence of the appellant at the spot and cutting of the tree by the complainant party was not disputed. It was also submitted that the Medical Officer has opined that the blow was given with blunt side and not with the sharp side and as such, the provisions of Section 307 I.P.C. are not attracted. It was further submitted that since the injured had received the injury on head by fall or during scuffle, the appellant is not liable and in the alternative, only one injury was caused with blunt side in exercise of right of private defence and, therefore, the appellant cannot be held liable under Section 307 I.P.C. In the alternative, it was pleaded that the quilt is established, if any, under Section 325 I.P.C. On the sentence imposed it was submitted that the appellant had no criminal history and accused is a aged person and because of the relations in between the parties, the appellant deserves leniency of the Court and the sentence awarded deserves to be reduced considerably.

On the other hand, the learned Additional Advocate General for the respondent/State had supported the impugned judgment for the reasons given therein. It was submitted that since the appellant came duly armed with a Darat, it showed his intention and since the Medical Officer had corroborated the statement of the injured that the injury was possible with Darat, it gives credence to the testimony of the injured. It was submitted that the mere fact that the injured was accompanied by some labourers is not sufficient to hold that the appellant will not dare to attack the injured. It was also submitted that the complainant will not falsely implicate his own brother and the labourers had no score to settle with the accused that they will falsely depose against the appellant. In regard to the grappling or injuries having been sustained by fall, it was submitted that it was not established from evidence. In regard to right of private defence, it was submitted that the appellant had no licence to cause the injury, since he could have reported the matter to the police or Panchayat or could have taken recourse to law, but he had no right to inflict the injury on the person of the injured with Darat over the head which could have proved fatal. On the sentence, it was submitted that it is for the Court to consider this plea keeping in view the facts and circumstances of the case.

On a perusal of the record of the case, it is clear that the occurrence had taken place on 30.12.2002 at 9.30 A.M. The statement was made under Section 154 Cr.P.C. by Smt. Kamlesh Kumari wife of the injured on the same day at 11.45 A.M. The distance in between the place of occurrence and Police Station is 10 K.M. as mentioned in Ext.PW5/A and it is, therefore, clear that it must have taken sometime for the police party to reach the place of occurrence on receipt of the information.

Thus, there was no delay in lodging of the F.I.R. It was lodged with promptitude and the police party had reached the spot on receipt of a report at 10.45A.M. and Rapat Ext.PW14/A was recorded in regard to the telephonic message. Thus, there was no delay in lodging of F.I.R.

Coming to the evidence, the injured had appeared in the witness box as PW-6 and he clearly stated that he had called one Ali Mohammad for cutting of the trees and had gone to the spot along with his wife and servant Dev Bahadur for getting the tree cut. He stated that in the family adjustment he got the possession of the land. He had gone to the spot along with wife, servant and six Charanies and when they had already cut one Tuhni tree and were going to cutting the second tree, accused came there along with a Darat in his hand. He abused him and the Charanis and threatened him. He requested the accused that the tree and land belongs to him and he needs timber, but the accused gave a blow of Darat on his head and blood started oozed out. Thereafter, the accused gave 2-3 blows of Darat on his back and he was saved by the persons present there. He was taken to roadside and then to hospital for treatment. In cross-examination he stated that he got executed settlement deed of 46 Kanals in his favour. The family settlement was done in the year 2002 by his father in the presence of Panch. He stated that the lower field where the tree was standing belongs to him. He denied having given any blow to the accused with danda or he grappled with the accused or suffered injuries by fall.

PW-5 Smt. Kamlesh Kumari wife of PW-6 Bidhi Chand injured had materially corroborated the statement made by PW-6 Bidhi Chand. These statements have been further corroborated by PW-4 Dev Bahadur, servant of PW-6 Bidhi Chand, PW-18 Ali Mohammad as well as

PW-19 Ibrahim who had gone to the spot for cutting of the trees. The statements of these witnesses corroborate the testimony of injured and his wife on all the material particulars and there are no contradictions or infirmities in the statements of these two witnesses or in the statements of the injured, his wife and servant.

The above evidence has been further corroborated by the medical evidence from the statement of PW-1 Dr. C.R. Verma who had examined the injured and found lacerated wound on the parietal region which was bone deep. He opined that this injury was grievous in nature and according to his opinion given in MLC this could be dangerous to life. However, he has not stated in regard to the injuries on the back inflicted if any, by the accused. He clearly stated that this injury was possible with Darat Ext.P-1 from its blunt side and the mere fact that the medical officer has stated that it was inflicted from blunt side and not sharp side is not sufficient to hold that this injury was not grievous injury. There is specific opinion of the Medical Officer that it was lacerated wound on parietal rejoin which could have been dangerous to life also. He stated that he gave opinion that it was a lacerated wound as the edges were not sharp. PW-2 Dr Suresh Kumar, Radiographer, had taken the x-rays and PW-8 Dr. P.C. Verma found the fracture of left parietal bone. PW-3 Dr. N.K. Sharma had examined the appellant and found no injury on his person and, therefore, the plea taken by him in the cross-examination of the witnesses that the injured inflicted danda blows on his person does not stand substantiated by the statement of the Medical Officer. The other witnesses are of formal nature, namely, PW-7 Vijay Chand who is a witness to the recovery of Darat vide recovery memo, PW-9 Dr. Arvind Dogra, has been examined to prove that the injured remained admitted in

the private hospital with effect from 2.1.2003 to 22.1.2003 and he was admitted for head injury. The mere fact that the injured was taken to the private hospital for treatment is not sufficient to hold that this statement cannot be relied upon since a plea was taken that he had given wrong report at the instance of one Dr. Ajay Sharma working in his hospital but that is not a ground to disbelieve the statement of this witness. It is the choice of the injured to get himself treated in Government hospital or private hospital.

PW-10 Jeewan Singh, Patwari had gone alongwith PW-11 Sukhdev Singh, Field Kanungo and on demarcation it was found that tree has been cut from Khasra No. 428 and PW-11 Sukhdev Singh issued his report Ext. PW11/A in this regard. Copy of jamabandi Ext. PW10/B shows that this Khasra No.428 was entered in joint ownership and possession of the parties and is not recorded in exclusive possession of either of the parties. PW-12 Dev Raj Sharma, Retd. Tehsildar has been examined to prove that the land belongs to Bidhi Chand and had come to his share, but in the absence of any documentary evidence, no conclusion can be drawn that this land was in possession of the complainant or the accused. PW-13 Dr. Vaneet Gill had treated the complainant in P.G.I. Chandigarh. PW-20 Inspector Hukam Chand, S.H.O. has investigated the case, effected the recovery and prepared site plan also and took demarcation report.

The learned counsel for the appellant wanted to take assistance from the site plan Ext. PW20/E to show that the place where the quarrel took place, the signs of grapple have been shown to be present there. The Investigating Officer was not a witness to any grappling and this fact had to be established from the evidence and there

is no evidence to show that any grappling took place in between the complainant or the accused or the complainant fell down and, therefore, no benefit can be taken from this site plan which only depicts the place where the tree was existing or where it was found cut and as to the distance of the house from the place of occurrence.

From the above detailed examination of the evidence, it is clear that in the absence of documentary evidence or specific evidence in regard to the private settlement in between the parties, it cannot be said that the place from where the tree was cut was in possession of the complainant though the complainant had led oral evidence by his own statement and of his wife and others in this regard. However, no findings are required to be given by the Criminal Court in this regard since this point is to be determined on the basis of the evidence to be led before the Civil Court, but the complainant has claimed that this tree was existing over the land in his possession. The facts of the case show that the complainant had also come one day earlier to the spot and, therefore, it was apparent to the appellant that the complainant will come again for cutting of the tree which he allegedly claimed was in his possession. Therefore, the appellant had the remedy either to report the matter to the police or Panchayat or obtain stay order if the time permitted, but he could not take recourse to law by inflicting injury on the person of the injured. In the alternative, he had the remedy to claim the price of the tree subsequently from the injured by filing a civil suit, but the right of private defence was not available to the complainant in the facts and circumstances of the case. No injury has been proved which have been inflicted upon him that he took recourse to law and inflicted injury on a vital part of the body of the injured which could have proved fatal and,

therefore, there was no right of private defence available to the appellant nor it can be said that he had not exceeded the right of private defence available to him. The mere fact that the complainant was accompanied by his wife, servant and six Charanis is not sufficient to hold that the appellant would not have dared to attack the injured since the complainant party was more in number. In such circumstances, when the labourers had gone with the injured, it cannot be accepted that they will support the complainant or will not try to save themselves in case some quarrel took place at the spot since they have no love for either of the party and they would save themselves only. Therefore, there is no substance in the plea raised by the learned counsel for the appellant would not have dared to attack the injured at that time or that the case has been falsely foisted upon accused. The presence of the appellant at the spot and the occurrence having taken place stands established and the plea of sustaining of the injury by the injured at the time of grappling or by falling or that the appellant had exceeded right of private defence does not stand substantiated from the evidence.

In regard to the defence plea, the learned Additional Advocate General for the State had relied upon the decision in **Nasir Sikander Shaikh** Vs. **State of Maharashtra, (2005) 10 Supreme Court Cases 585**, wherein it was observed that prosecution has to prove every ingredient of the offence and defence only to probabilise, there must be some material to support the plea of the defence. Courts below concurrently found the evidence of PWs 2 and 3 to be acceptable, there was no reason to take a different view, therefore, the conviction was upheld. Statement of DW-1 Joginder Pal in defence is only to this fact that the tree was owned and possessed by Parkash Chand and I

have already held above that even if the tree was not in exclusive possession of the injured, the accused had no right to cause the injury.

The learned counsel for the appellant had relied upon the following decision to substantiate his arguments. The decision in **Hari Kishan and State of Haryana** Vs. **Sukhbir Singh and others**, **AIR 1988 Supreme Court 2127** shows that the intention or knowledge of the accused must be such as is necessary to constitute murder. Without this ingredient being established, there can be no offence of "attempt to murder". Under Section 307 the intention precedes the act attributed to accused. However, it was clearly observed that the intention is to be gathered from all circumstances, the nature of weapon used, the manner in which it is used, motive for the crime, severity of the blow and part of the body where the injury is inflicted. The above decision of the Hon'ble Apex Court is clear that all the circumstances are to be considered and in the present case the injury was caused with Darat over the vital part of the head and there is opinion of the Medical Officer that this injury could have been fatal. The decision in **Ram Rattan and others** Vs. **State of Uttar Pradesh**, **AIR 1977 Supreme Court 619** relied upon does not help the appellant since while discussing the right of private defence of property, it has been clearly laid down that this right is not available to true owner if the trespasser has been successful in accomplishing his possession to the knowledge of the true owner who should take recourse to the remedy available under the law.

On a perusal of the evidence led by the prosecution, the oral as well as medical including the statement of the accused under Section 313 Cr.P.C. and the defence witnesses examined by the appellant, it is clear that the learned trial Court had come to a right conclusion that the

guilt of the appellant stands established under Section 307 I.P.C. and those findings of the learned trial Court do not call for an interference by this Court and as such, are liable to be affirmed.

In regard to the plea taken in the alternative that the appellant deserves the leniency of the Court in view of the facts and circumstances of the case, it has been pointed out that the age of the appellant as given by him at the time of examination under Section313 Cr.P.C. was 59 years, which statement was recorded in the month of June, 2004. Presently, the appellant will be around the age of 62 years. The appellant and the injured are real brothers and the appellant is in custody and has already served the sentence for about three years or so. Keeping in view the facts and circumstances of the case, the sentence imposed by the learned trial Court of seven years under Section 307 I.P.C. is reduced to four years R.I. and the fine of Rs.10,000/-, as awarded by the trial Court. Revised warrant be issued by the trial Court. A copy of the judgment be sent to the appellant through the Jail Superintendent for information.

(V.K. Ahuja),
Judge

April 25, 2007.
(BSS)